International legal status of the northwest passage

THE INTERNATIONAL LEGAL STATUS OF THE NORTHWEST PASSAGE

Katharine Dunkley

Law and Government Division
Research Branch
Ottawa

9 August 1985

LIBRARY OF PARLIAMENT

THE INTERNATIONAL LEGAL STATUS OF THE NORTHWEST PASSAGE

Katharine Dunkley

Law and Government Division
Research Branch
Ottawa

9 August 1985

BACKGROUND PAPER FOR PARLIAMENTARIANS

Cat. No. YM32-2/135E

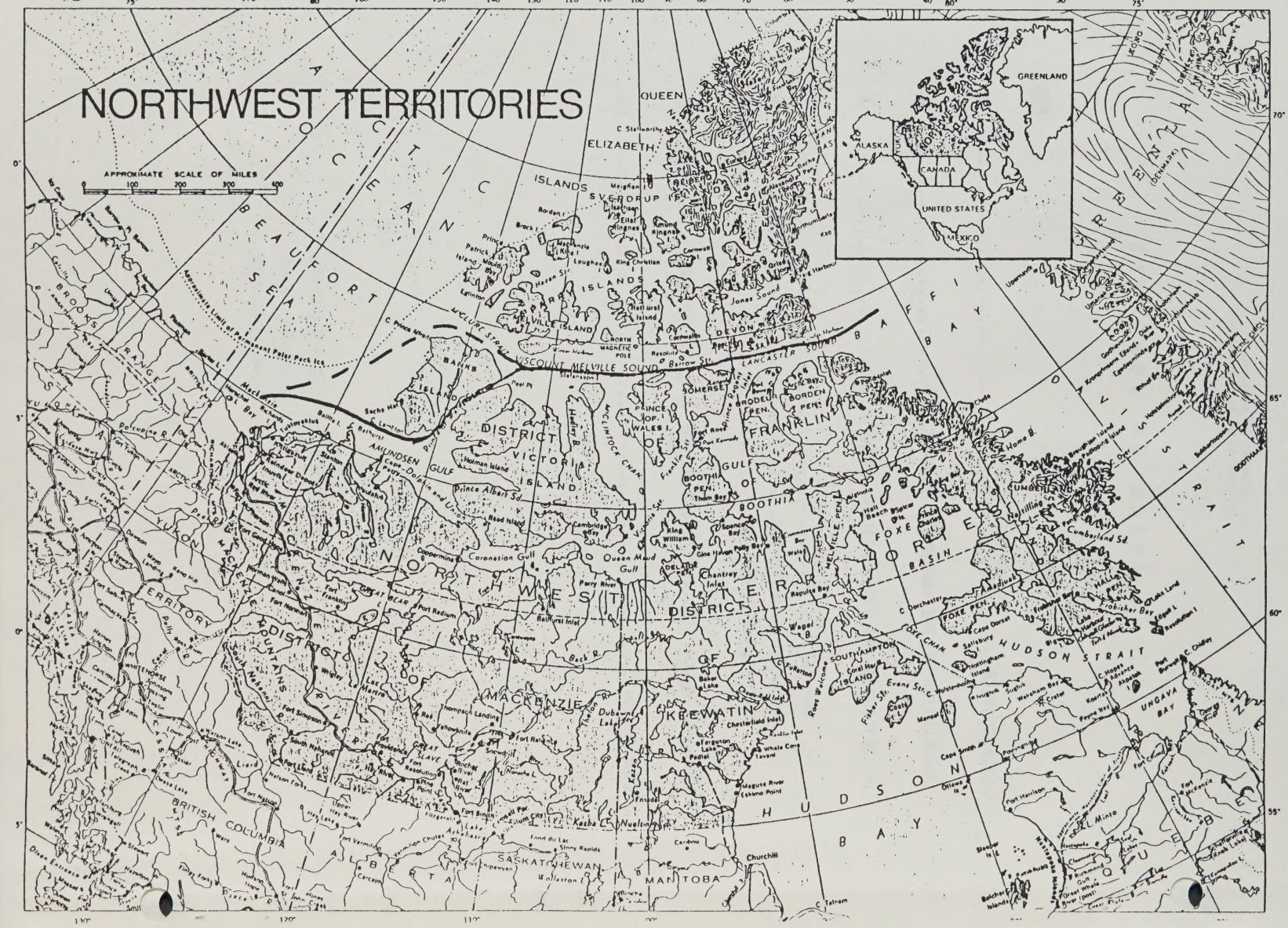
ISBN 0-660-12405-X

TABLE OF CONTENTS

#1 ——————

#2 – – – – – – –

ROUTES THROUGH THE NORTHWEST PASSAGE



CANADA

LIBRARY OF PARLIAMENT
BIBLIOTHEQUE DU PARLEMENT

THE INTERNATIONAL LEGAL STATUS OF THE NORTHWEST PASSAGE

INTRODUCTION

The voyage of the U.S. icebreaker, the Polar Sea, through the Northwest Passage highlights an unresolved difference of views between Canada and the United States regarding the status in international law of this historic but little used northern sea route passing among Canada's Arctic Islands from the Atlantic Ocean (through Davis Strait and Baffin Bay) to the Beaufort Sea, and eventually the Pacific. The following notes outline the legal considerations involved and the strength of Canada's claims to the right to control passage through these Arctic waters. The present legal situation and Canadian actions to assert their claims are described, as well as the possible future legal situation if the Northwest Passage came into increasing use for transportation of oil from the Beaufort to Eastern North America or Europe.

These notes focus on the crucial and still open question whether the Northwest Passage is, or would ever become, an "international strait". Such a designation would subject it to a special legal regime under international law. Canadian sovereignty in the Arctic, over Arctic islands and waters in general, is well established, and is not being challenged. The islands form part of the Northwest Territories, their inhabitants are subject to territorial and Canadian federal law.(1). Canadian rights over the continental shelf in the Arctic, to a 12-mile

---

(1) See External Affairs Legal Bureau memoranda appearing in The Canadian Yearbook of International Law 1981 (Volume 19 p. 320-323), describing the factual and legal situation with regard to Canadian sovereignty in the Arctic, and the Law of the Sea (as it relates to International Straits and Rights to Passage). On this point, see "Arctic Lands", p. 320.

territorial sea and a 200-mile fishing zone "are as firmly established in the Arctic as elsewhere".(1)

With respect to the Northwest Passage the situation is much less clear. Canada has consistently maintained, and continues to maintain the position that the waters making up the Passage are internal and that any navigation in the Passage will be subject to Canadian control and regulation for safety and environmental purposes.(2) The United States takes the view that foreign ships have a right of passage through the Northwest Passage, since it may be classified either as an "international strait" or at most, "territorial seas" (with exact rights depending on classification of the type of strait according to international law.) As the following notes will indicate, the legal situation is complex and by no means fixed. Although Canada's denial of "international straits" status may be true of the Northwest Passage today, future technological advances in shipping through ice-covered waters and commercial development of Arctic resources could bring about a change in the international legal situation.

The following sections describe briefly the Northwest Passage, then discuss the definition of international straits and whether the Northwest Passage can be so classified. Then Canada's claim that Arctic waters are "internal waters", and methods of asserting that claim are reviewed. Past and future legislative and other actions to preserve Canada's jurisdiction over the area are described.

DESCRIPTION OF THE NORTHWEST PASSAGE

The two most direct routes through the Northwest Passage are shown on the map facing page 1. The first passes from Baffin Bay through Lancaster Sound, the Barrow Strait, Viscount Melville Sound, then turns south through the Prince of Wales Strait (on the east side of Banks Island) and thence into Amundsen Gulf and the Beaufort Sea. This was the route followed by U.S tanker the Manhattan in 1969 and by the Polar Sea on its

(1) External Affairs Legal Memoranda, "The Arctic Waters", in Canadian Yearbook of International Law 1981, p. 321-322.

(2) Ibid., "The Northwest Passage", p. 322.

recent voyage. No ship has successfully navigated the most direct route (Number 2 on the Map) which proceeds from Viscount Melville Sound west through M'Clure Strait and out into the Beaufort. The following describes the five straits in these two routes:

> Lancaster Sound, which is the eastern entrance of the Northwest Passage, is a wide strait about forty-five miles wide and 165 miles long. Barrow Strait averages about forty miles wide and is 170 miles long. In this strait, however, there are a number of mid-channel islands in the western sector, the more important ones being Lowther Island (roughly 11 x 5 miles) and Young Island (about fifteen miles to the southwest of Lowther Island and measuring aboux 6 x 2 ½ miles). A ship proceeding through Parry Channel must follow this route between Young and Lowther islands, a passage of only fifteen miles' width. Viscount Melville Sound is an immense strait about ninety-five miles wide and some 230 miles long. M'Clure Strait at the western end of Parry Channel averages about seventy miles wide, with an entrance of 103 miles, and is 180 miles long. As for Prince of Wales Strait, it is only about ten miles wide for most of the distance.(1)

DEFINITION OF AN INTERNATIONAL STRAIT(2)

A. General

The UN Law of the Sea Convention, signed in December 1982(3) contains a set of provisions on international straits,

---

(1) D. Pharand, "The Northwest Passage in International Law", in The Canadian Yearbook of International Law 1979, (Vol. XVII) p.99-133 at p.100.

(2) The remainder of these notes rely heavily on the authoritative work of Donat Pharand, The Northwest Passage: Arctic Straits. Martinus Nijhoff Publications Dordrecht, 1984 (Chapters 6, 7, 8, p. 88-121).

(3) The Convention was finally adopted in April 1982, and by September 1984, 134 states had signed. The USA, U.K., Belgium, Federal Republic of Germany and Italy refused to sign, and only 14 states had ratified (60 ratifications required for it to come into force). The legal basis of the following discussions refers to the Convention where standards therein codify customary international law or were widely agreed upon, but the treaty is not legally in force.

specifying the categories of international straits covered by the Convention, and the legal regime applicable to each. However, no definition of an international strait appears in the 1982 Convention itself, or in the 1958 Geneva Convention on the Territorial Sea. Thus the meaning of "straits used for international navigation" must be derived from customary international law. The accepted definition contains two elements - one geographic and the other functional. The geographic criterion is relatively straightforward, but the interpretation of the degree of use required to fulfil the functional criterion is a complex matter open to debate.

B. Geographic Criterion

Any strait is a narrow, natural passage between land connecting two seas or large bodies of waters. If a strip of high seas exists, no special legal regime applies; the traditional principle of freedom of the seas applies. If at any point in the strait the passage is narrow enough for an overlap of territorial water to result, the strait is considered a "territorial" or "legal" strait, governed by a special legal regime.

Since a 12-mile territorial sea has been accepted in international law, a strait 24 miles or less in width is considered a "territorial" or "legal" strait. Under the 1982 Law of the Sea Convention, such a strait must join either a part of the high seas (or the exclusive economic zone) with another part of the high seas (or another part of the exclusive economic zone) or a part of the high seas (or exclusive economic zone) with the territorial sea of a foreign state.(1)

---

(1) Any pockets of high seas in these areas are incorporated into surrounding territorial seas.

From an earlier description of the Northwest Passage, it will be clear that these straits meet the definition of legal or territorial straits (putting aside for the moment the view that the waters of the Arctic Archipelago are all internal waters, and proceeding on the assumption that they are instead territorial waters).(1) The passage links two parts of of the high seas (Baffin Bay and the Atlantic on the east to the Beaufort and Chukchi Seas, Bering Strait and the Pacific in the west). In all possible routes through the passage there is an overlap of territorial waters.

The extension of Canada's territorial waters to 12 miles in 1970 resulted in an overlap of territorial waters in the western portion of Barrow Strait, part of both Routes 1 and 2. The presence of islands in the strait narrows the passage to 15 ½ miles at one point. Route 1, through Prince of Wales Strait, entails a passage through a strait of less than six miles (and all other routes are narrower). Thus the Northwest Passage constitutes a legal (territorial) strait, in that it connects two parts of the high seas and has an overlap of territorial waters in all of its routes.

C. Functional Criterion

Only "straits used for international navigation" fall within the regime of Part III of the 1982 Law of the Sea Convention (regarding international straits) and are subject to the international rights of passage set out therein (either "transit" passage or in some cases nonsuspendable "innocent" passage.)(2) The territorial waters of legal

---

(1) The discussion of the validity of the characterization as internal waters appears at p.7, infra.

(2) "Traditionally, in the absence of a specific treaty, the right of innocent passage applied in international straits, save that coastal states could not suspend that right. Under the new Law of the Sea negotiating text, a new regime of "transit passage" would be established and would permit free navigation of ships (including submerged submarines) and free overflight of aircraft through straits used for international navigation (except for a few straits already governed by particular conventions." External Affairs Legal Memoranda, "Rights of Passage" in Canadian Yearbook of International Law 1981, p. 328.

or territorial straits not characterized as "international" will be subject only to the ordinary suspendable right of innocent passage applicable to any territorial waters. Waters classified as "internal waters" are subject to control by the state exercising jurisdiction over them.

The degree of use required for a strait to be considered to be "used for international navigation" is a matter of great importance, and was one on which agreement was not reached during the Law of the Sea Conference. The standard thus has not been codified, and there is no indication whatever in conventional law as to the necessary degree of use. The North Corfu Channel case, decided in 1949 by the International Court of Justice, remains an important precedent. The court applied both the geographical and functional criteria:

> In answering the question "whether the test is to be found in the volume of traffic passing through the Strait or in its greater or lesser importance for international navigation", the court stated that "the decisive criterion is rather its geographical situation as connecting two parts of the high seas and the fact of its being used for international navigation"....
>
> The International Court of Justice held that the fact that the North Corfu Channel was not a necessary route between two parts of the high seas but only an alternative passage could not be decisive. What was more important was that it had been a "useful route for international maritime traffic". The evidence showed that it had been a very useful route for the flags of seven states: Greece, Italy, Romania, Yugoslavia, France, Albania, and the United Kingdom. The 2,884 crossings covered only the ships which had put in port and had been visited by customs. It did not include the large number of vessels which had gone through the strait without calling at the Port of Corfu. In other words, the actual use of the North Corfu Channel had been quite considerable.(1)

(1) Pharand, The Northwest Passage, p. 93.

It is very clear that the Court found that the Channel was used to an "important extent". Professor Pharand states: "it seems clear that before a strait may be considered international, proof must be made that it has a history as a useful route for international maritime traffic similar to that shown to exist in the North Corfu Channel. He goes on to cite Professor O'Connel (The International Law of the Sea (1982)) in whose opinion the Corfu Channel Case established "that not all straits linking two parts of the high seas are international straits, but only those which are important as communication links... it need not be the only or an indispensable or a necessary avenue, but equally clear that mere potential utility is insufficient"(1)

Throughout the 80-year history of attempted exploratory navigation in the Northwest Passage, only 40 complete transits have taken place, 27 by Canadian ships. Of 13 foreign crossings, 10 were American, 1 Norwegian, 1 Dutch and 1 Japanese, (some in pleasure yachts).(2) To this will soon be added the passage of the icebreaker the Polar Sea. All transits to date have been experimental. Although the Manhattan was a tanker, it made only a feasibility voyage filled with water. All transits nave been made with Canada's consent or acquiescence, express or implied. Professor Pharand concludes, as to the present legal status of the Northwest Passage:

> In these circumstances, it is obvious that by no stretch of the imagination could the Northwest Passage pass the threshold test for it to be classified as an international strait. Those who maintain that the passage may be so classified obviously confuse actual use with potential use. The latter is the criterion used by American courts to determine whether a waterway is navigable or not. In such cases, ... it is the capacity for navigation which is the effective criterion, but it is not the criterion of actual use applied in international law.

---

(1) Pharand, The Northwest Passage, p. 94-95.

(2) Documented up to 1984 in Pharand; The Northwest Passage, Chapters 2 and 3.

CANADA'S CLAIM THAT ARCTIC WATERS ARE INTERNAL WATERS

Given the scarce and experimental use of the Northwest Passage to date, denial of "international strait" status appears relatively easy to establish in international law for the present. Many commentators foresee the possibility that any significant degree of Beaufort oil shipping could result in internationalization of the passage, if Canada does not take firm action to assert its claims that all the waters of the Arctic archipelago are not merely territorial waters but internal waters subject to complete Canadian control.

The central importance of the characterization of the waters as internal arises from the rights of passage for foreign ships, applicable not only in international straits but also in territorial seas. The coastal state has slightly more control (over pollution, passage of warships, including submarines) in the case of territorial seas than international straits but in neither case may it routinely deny passage.

If the waters of the Northwest Passage are territorial waters, the "right of innocent passage" applies.

> The right of innocent passage is a right in the strict sense of the term and not simply a privilege or a tolerance. It has been recognized in customary international law since the latter part of the 19th century, by the Territorial Sea Convention of 1958, and by the 1982 Convention on the Law of the Sea. Indeed, it is this right of innocent passage which traditionally distinguishes the legal status of internal waters, over which a state has absolute sovereignty, from that of territorial waters, where the sovereignty of the coastal state is subject to this restriction. It is only since the 1958 Territorial Sea Convention that the newly enclosed internal waters of a coastal archipelago have been subject to the right of innocent passage.(1)

Although as a coastal state Canada would have the right to take certain general protective measures to regulate innocent passage, and

---

(1) Pharand, The Northwest Passage, p. 102. (A discussion of the right of passage through newly enclosed internal waters of a coastal archipelago, and the "historic waters" exception to it appears at p. 11 infra.

special protective measures since the Passage is an ice-covered area, the scope of these measures would be strictly limited by international law.

Canada's position has been that the waters of the Arctic, including the Northwest Passage, are internal waters. This position has been stated on numerous occasions.

> . December 1973 letter from Bureau of Legal Affairs.
>
> "Canada also claims that the waters of the Canadian Arctic Archipelago are internal waters of Canada, on an historical basis, although they have not been declared as such in any treaty or by any legislation".
>
> . May 1975, statement by the Secretary of State for External Affairs to Standing Committee for External Affairs and National Defence, discussing the Law of the Sea.
>
> ... the provisions define the straits as only those which are used for international navigation and exclude straits lying within the internal waters of a state. As Canada's Northwest Passage is not used for international navigation and since Arctic Waters are considered by Canada as being internal waters, the régime of transit does not apply to the Arctic.

Throughout the 1970s, Canada has taken various legislative actions to assert its sovereignty over the waters of the Arctic, by establishing four functional zones. Pursuant to the Territorial Sea and Fishing Zones Act(1), it issued an order granting Canadian control over fishing activities out to 200 miles in Arctic waters.(2)

The Canada Oil and Gas Act(3) authorizes the Minister of Indian and Northern Affairs to enter into petroleum exploration agreements and grant production licences to marine areas out to 200 miles or the outer edge of the continental margin, whichever is greater. The Canada Shipping

---

(1) R.S.C. 1970, c. T-7.

(2) Fishing Zones of Canada (Zone 6) Order, C.R.C. 1978, Vol. XVII, c. 1549.

(3) S.C. 1980-81-82-83, c. 81, as amended.

Act[1] controls pollution in a zone between 100 and 200 miles offshore, and applies in the Arctic.

Of particular importance is the Arctic Waters Pollution Prevention Act[2] which grants regulatory power over pollution within a 100 mile zone adjacent to the Arctic mainland and islands. This piece of legislation was passed in 1970, shortly after the voyage of the Manhattan through the Northwest Passage. It was a controversial unilateral move, strongly opposed by the United States, which objected to Canada's assertion of jurisdiction over foreign ships on the "high seas". Since its passage, Canada has undertaken intense diplomatic efforts to obtain recognition for this special measure, and Professor Pharand concludes that the special "Arctic exception" clause[3] (agreed to by the US and U.S.S.R. at the Law of the Sea Conference) validates Canada's legislation, and because of the wide consensus on the clause, forms part of customary international law, as well as part of the treaty.

None of these domestic statutes or other measures of control are sufficient in international law to dictate the international legal status of Arctic waters. Many commentators suggest that, in order to provide a basis for its claim to sovereignty over the waters of the Arctic, Canada should adopt legislation adopting a regime of "straight baselines" encircling the Arctic archipelago, making all the waters internal, and drawing the territorial sea from outside the baselines.

In the article "Inuit and the Ice:Canadian Arctic Waters"[4] the authors describe the legal requirements for straight baselines. The normal method for delimiting the territorial sea is to follow the low tide mark around the sinuosities of the coast,[5] but

---

(1) R1S.C. 1970, c. S-9, as amended.

(2) R.S.C. 1970 (1st Supp.), c.2.

(3) Article 234 of the Law of the Sea Treaty.

(4) David Vanderzwaag and Donat Pharand, in Canadian Yearbook of International Law 1983, Vol. XXI, p. 53-84.

(5) See Article 5, Convention on the Law of the Sea.

where there is a coastal archipelago (or a deeply indented coastline) states may delimit the territorial sea by drawing straight baselines. In the case of coastal islands, lines may be drawn around the outer perimeter of the archipelago. Waters landward of the baselines would then become internal waters.

> After establishing the overall applicability of the straight baseline system, a claimant state would also have to meet two geographical requirements in actual baseline implementation. As provided in Article 7(3) of the Convention on the Law of the Sea, a state would have to demonstrate that the lines, actually drawn, do "not depart to any appreciable extent from the general direction of the coast" and "the sea areas lying within the lines must be sufficiently closely linked to the land domain to be subject to the regime of internal waters.
>
> The potential harshness of such geographical criteria is lessened by an additonal optional criterion. For particular baselines which depart somewhat from the geographical criterion - for example, through excessive length or directional variation from the coastline - Article 7(5) of the Convention on the Law of the Sea still allows states to justify such lines by showing a long history of economic dependency on the enclosed marine region".(1)

Vanderzwaag and Pharand argue that the Archipelago meets the basic criterion of being a coastal archipelago and that straight baselines would be valid. The islands form a visual unity with the rest of Canada and the Northern and Southern portions are linked by islands in the shallow part of Barrow Strait. Canada could argue similarity with Norway, where the straight baseline approach was held to be valid by the International Court of Justice in the Anglo-Norwegian Fisheries case. They suggest that the lines do follow the general direction of the coastline, if this requirement is given a liberal interpretation. As to the close land-sea link requirement, both the ratio of sea to land is appropriate, as is the use of ice for transportation, hunting (and settlement while hunting) by the Inuit, research, airstrips, etc. A description of Inuit life-style both past and

---

(1) Vanderzwaag and Pharand, "Inuit and the Ice", p. 59-66

present provides strong evidence of economic dependence on the enclosed region; these aboriginal people in the past relied almost entirely on the sea/ice for food, and trade goods, and indeed the basis of their culture. All of these factors strengthen Canada's right to enclose Arctic waters in straight baselines and have the international community accept the designation as "internal waters".

In making this argument, Canada would be best to rely on customary international law (as stated in the Anglo-Norwegian Fisheries case) for two reasons. By customary law, designation of the waters as internal gives Canada complete sovereignty over the enclosed waters, whereas application of conventional law (1958 or 1982 treaties) would mean that certain rights of passage would continue to apply, unless it could also be established that the waters are internal by reason of historic title.(1) In addition, the criteria of customary law with respect to geographic requirements are more flexible than those under the Convention.

In justifying some of the very long baselines involved, Canada could invoke historic use of the waters.

> In particular, Canada is in a position to rely on the fact that it performed a number of manifestations of sovereignty, such as the collection of customs in the western Arctic and the enforcement of fisheries and whaling legislation in the eastern Arctic, beginning in 1903 and 1904 respectively. Canada could also invoke the exclusive sea-ice use for hunting and fishing by its Inuit for at least 4,000 years, which it has protected by the adoption of such measures as the creation of the

---

(1) See Pharand, The Northwest Passage, p.98. "If the waters are internal because of the establishment of straight baselines, they are assimilated to territorial waters for the purposes of passage and either transit passage or non-suspendable innocent passage would apply ... If the waters are internal by reason of historic title, no right of passage applies and the strait would normally not be capable of becoming an international strait. The only possible exception to the latter legal status would result from the coastal state permitting foreign use of the strait without adequate conditions attached. A right of passage would then result from the acquisition of a servitude, rather than from the status of the waters per se."

Arctic Islands Preserve in 1926 and the enactment of the Arctic Waters Pollution Prevention Act in 1970.(1)

Further measures to enhance Canada's technological sovereignty along with legal sovereignty are also important. Canada must develop both sea and land-based services - communications, search and rescue, supply posts, and particularly ice-breaking and pilotage - as a way of asserting its presence, and enforcing its laws. It could then control use of the passage by agreements with foreign shippers using the passage, in keeping with the stated policy of opening up the passage for shipping while protecting the ecological balance of the Arctic.

CONCLUSION

The legal status of the waters of the Northwest Passage is a complex and unsettled question. While it is relatively clear that the degree of use in the past is far too small to make the passage an "international strait", it is also evident that Canada's claim to "internal waters" status requires further legislative and technological action to become the accepted international legal regime. Whatever the status of the waters, Canada has some recognized rights to prevent pollution in Arctic waters, on the basis of both its legislation and the special "Arctic exception" in the Law of the Sea Treaty permitting coastal states to adopt and enforce standards relating to design, construction, and equipment of foreign ships. The degree of control Canada may exercise is greatest if the waters are historically internal waters. If the passage is either an international strait or territorial seas, foreign ships will be able to exercise rights of passage through the straits, with very limited Canadian control.

---

(1) Pharand, The Northwest Passage, p. 112.


0 50505 25072 1